STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **Court of Appeals No. 338733**

JACQUES JEAN KABONGO,
Defendant-Appellant.

Wayne County Circuit Court No. 16-010745-01-FH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People concur with the Defendant's statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

The determination whether to excuse a prospective juror for cause is within the trial court's discretion. Here, the trial court did not remove a juror for cause because the juror stated that she could be fair. Where there was no ground to remove the juror for cause, did the trial court abuse its discretion in refusing to remove the juror?

The trial court would answer this question, "No."

The People answer, "No."

The Defendant would answer, "Yes."

II.

A trial court's findings of fact as to whether the prosecution's explanation for the peremptory challenge was pretext and whether the defendant has proven purposeful discrimination are both reviewed for clear error. Here the trial court made findings of fact that the prosecutor's non-discriminatory reasons for excusing three jurors was not a pretext for discrimination and these reasons are fully supported by the record. Therefore, was there clear error in the trial court's findings?

The trial court did not answer this question.

The People answer, "No."

The Defendant would answer, "Yes."

COUNTERSTATEMENT OF QUESTION PRESENTED (CONT.)

III.

The grant or denial of a mistrial is reviewed for an abuse of discretion and an abuse of discretion will only be found when the denial of the motion denied the defendant a fair trial. The Defendant requested a mistrial because two police officers testified as to their reason for being in the area where the Defendant was arrested. Where the testimony did not deprive the Defendant of a fair trial, was it an abuse of discretion for the court to deny the Defendant's motion for mistrial?

The trial court would answer this question, "No."

The People answer, "No."

The Defendant would answer, "Yes."

IV.

A judge's instructions to a jury are reviewed for an abuse of discretion. Here, the trial judge, after consultation with both counsel, in response to a note from the jury requesting to see two police reports, instructed the jury that the police reports were not admitted as evidence in the trial. Since this response to the jury's question was factually and legally correct, was there an abuse of discretion?

The trial court would answer "No."

The People answer, "No."

The Defendant would answer, "Yes."

COUNTERSTATEMENT OF QUESTION PRESENTED (CONT.)

V.

Evidence is sufficient if a rational juror could have found all the essential elements of the crime were proven beyond a reasonable doubt. Here, two police officers testified that they saw the Defendant carrying a gun concealed by his shirt. Was this evidence, coupled with all the other evidence at trial, sufficient to prove that the Defendant carried a concealed weapon?

The trial court answered this question, "Yes."

The People answer, "Yes."

The Defendant would answer, "No."

VI.

To merit a new trial based on unobjected to remarks made by the prosecutor, a defendant must show that the remarks were so prejudicial that a cautionary instruction could not have cured the prejudice and that the remarks denied the defendant a fair and impartial trial. Here, the Defendant complains about comments made by the prosecutor in closing argument that were supported by the evidence. Was the Defendant denied a fair and impartial trial by the prosecutor's comments?

The trial court did not answer this question.

The People answer, "No."

The Defendant would answer, "Yes."

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. Following a jury trial, the Defendant was convicted of carrying a concealed weapon.[1] He was sentenced to one year of non-reporting probation and 50 hours of community service.[2]

On October 15, 2016, at about 4 p.m., the Defendant was at his house on Monte Vista Street in Detroit.[3] The police, while on patrol in the area, saw the Defendant with a gun exposed on the waistband of his pants.[4] As the police car rolled by the Defendant covered the gun with his blue shirt.[5] The Defendant was arrested for carrying a concealed weapon.[6] The Defendant's CPL license had expired.[7]

Other facts will be referenced as necessary within the brief.

[1] 4/04/2017, 59.
[2] 5/01/2017, 11.
[3] 4/03/2017, 196.
[4] 4/03/2017, 34.
[5] 4/03/2017, 38.
[6] 4/03/2017, 208.
[7] 4/03/2017, 196.

ARGUMENT

I. The determination whether to excuse a prospective juror for cause is within the trial court's discretion. Here, the trial court did not remove a juror for cause because the juror stated that she could be fair. Where there was no ground to remove the juror for cause, the trial court did not abuse its discretion in refusing to remove the juror.

Standard of Review

The People dispute the Defendant's statement of the standard of review since he merely names several standards of review without stating which one applies to the issue. The determination whether to excuse a prospective juror for cause is within the trial court's discretion.[8]

Discussion

The Defendant raises two issues as to the jury selection process. The Defendant first argues that juror number 14 should have been removed for cause because she expressed a negative opinion about open carry laws.[9] But the prospective juror number 14 that the Defendant is talking about, Lori Monkaba, was removed by peremptory challenge so she did not sit on the Defendant's jury.[10] Therefore, there is no possible prejudice to the Defendant, and, therefore, there is no basis to provide a new trial to the Defendant on this issue.[11]

Moreover, prospective juror number 14 ultimately did state that she would follow the law as the judge instructed and that she could be fair.[12] Also, the juror did not indicate that she had a

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[8] *People v Eccles*, 260 Mich App 379 (2004).
[9] Defendant-Appellant's brief on appeal, p. 8-10.
[10] 03/30/2017, 142.
[11] Causing a defendant to exercise a peremptory challenge to excuse a juror that the court could have excused for cause did not violate the defendant's due process rights; there is no constitutional right to a peremptory challenge. *United States v Martinez-Salazar*, 528 US 304 (2000).
[12] 03/30/2017, 139.

state of mind that would prevent her from rendering a just verdict.[13] Therefore, there was nothing to indicate to the court that the juror could not render a fair verdict in this case and the trial court did not abuse its discretion in failing to remove her for cause.[14]

The Defendant also argues that the judge refused to remove potential juror number five for cause. This is not true. The Defendant passed for cause when juror number five was part of the prospective panel, so there never was "a request" to remove juror number five for cause and, therefore, nothing was "refused" by the trial court.[15] The Defendant cannot stay silent at trial and then try to harbor error on appeal.[16] Also, the Defendant argues that juror number five should have been removed for cause because she had a prior felony conviction.[17] But the sheriff deputy testified that he ran her criminal record and she did not have a prior felony according to LEIN.[18] Therefore, she could not be precluded from being called for jury service.[19] The juror testified that she had a felony as a teenager when she was in Illinois.[20] It is possible that the juvenile conviction did not enter as a felony conviction and, therefore, she would not be excluded from jury service. But in any event, there is no basis to conclude that the juror would have to be excluded from jury service. Even if she was in fact a convicted felon, she still expressed that she could be fair and follow the law as the judge instructed, therefore, there was

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[13] See MCR 2.511(D).
[14] *People v Lamar*, 153 Mich App 127, 135 (1986).
[15] 03/30/2017, 90.
[16] *People v Buie*, 491 Mich 294, 312 (2012).
[17] Defendant-Appellant's brief on appeal, p. 10-11.
[18] 3/30/2017, 60.
[19] MCL 600.1307a(1) "To qualify as a juror, a person shall meet all of the following criteria: …(e) Not have been convicted of a felony."
[20] 3/30/2017, 55-57.

no prejudice to the Defendant.[21] Therefore, the trial court did not abuse its discretion in not removing this juror for cause.

[21] *People v Miller*, 482 Mich 540 (2008), held that where a convicted felon served on the defendant's jury, there was no prejudice to the defendant since the defendant was not deprived of a fair and impartial trial.

II. A trial court's findings of fact as to whether the prosecution's explanation for the peremptory challenge was pretext and whether the defendant has proven purposeful discrimination are both reviewed for clear error. Here the trial court made findings of fact that the prosecutor's non-discriminatory reasons for excusing three jurors was not a pretext for discrimination and these reasons are fully supported by the record. Therefore, there was no clear error in the trial court's findings.

Standard of Review

The People do not disagree with the Defendant's statement of the standard of review. The appellate court reviews for an abuse of discretion a trial court's ruling regarding discriminatory use of peremptory challenges.[22] A trial court's finding of fact regarding whether the prosecution's explanation for the peremptory challenge was a pretext and whether the defendant has proven purposeful discrimination are reviewed for clear error.[23] In reviewing a trial court's ruling regarding discriminatory use of peremptory challenges, the appellate court must give great deference to the trial court's findings because they turn in large part on a determination of credibility.[24]

Discussion

A. The trial court's findings of fact as to the Defendant's *Batson* challenge were not clearly erroneous.

The Defendant claims that the Defendant's challenge to the jury array should have been sustained since the prosecutor's proffered reasons for striking three African-American jurors were a pretext for excluding African-Americans from the jury.[25] But the record is utterly devoid of any evidence from which it can be concluded that the three prospective jurors excused were

[22] *People v Eccles*, 260 Mich App 379 (2004).
[23] *People v Knight*, 473 Mich 324, 338 (2008).
[24] *Id*.
[25] Defendant-Appellant's brief on appeal, p. 12-27.

excused because of race. Rather, the record unquestionably indicates that the prospective jurors were excused by the prosecutor for valid reasons unconnected to race. When a defendant alleges that the prosecution has improperly excluded a prospective juror on the basis of race, courts engage in a three-part analysis to determine whether the defendant has shown a case of unlawful discrimination.[26] First, the defendant must make a prima facie showing that (1) he or she is a member of a racial group, (2) the prosecution has used a peremptory challenge to exclude a member of that group from the jury pool, and (3) the circumstances raise an inference that the exclusion was based on the prospective juror's race. Second, if the trial court determines that the defendant made a prima facie showing, the prosecution must articulate a race-neutral reason for the strike. Third, the trial court must determine whether the race-neutral explanation is a pretext and the defendant has proven purposeful discrimination.[27]

The three prospective jurors in question, prospective jurors 2,3, and 14, were all excused for valid non-discriminatory reasons and the Defendant has utterly failed to prove that the race-neutral explanation was a mere pretext for racial discrimination. In regards to prospective juror 2, the assistant prosecutor gave the following reason for excusing the juror:

> MS. POSIGIAN: With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated she's having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort of specifics. Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago. I don't remember anything. So she had a problem with memory and it's the People's concern for her that if

[26] *Batson v Kentucky*, 476 US 79 (1986).
[27] *Id*.

> we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget testimony seemed fairly probable and the People were concerned about that.[28]

In looking at the transcript, the prosecutor's proffered reasons for choosing to excuse the juror are borne out by the responses given by prospective juror number 2. For example, prospective juror number two did say that she suffers from "senior moments" as an excuse for her poor memory. The exchange was as follows:

> THE COURT: Now has anyone on the panel or a member of your family, or a close friend been the victim of a crime? Anybody in the first row? I usually get a lot of yes's on this one so I'm going to take my time and make sure I cover everybody. Yes, juror number two?
>
> POTENTIAL JUROR TWO: Yeah, we have been – our family has been but it was a long time ago. I can't remember the years and stuff. Senior moment. I'm 64 so…
>
> THE COURT: I'm not so far behind you.
>
> POTENTIAL JUROR TWO: We have had, you know, robbery and stuff like that but it was, like, a long time ago nothing recent.[29]

Prospective juror number two also could not remember when she last served on a jury or what happened in the case:

> THE COURT: Have any of the panel ever been on a criminal jury panel before by show of hands? Okay. Let's start with juror number two. How long ago was that?
>
> POTENTIAL JUROR TWO: Years and years ago but we didn't have to serve because the defendant pled or something and then we left.[30]

Prospective juror number two also could not remember when she had been pulled over by the police. The assistant prosecutor asked the following question:

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[28] 3/30/2017, 146.
[29] 3/30/2017, 49-50.
[30] 3/30/2017, 43.

> MS. POSIGIAN: All right. Now, the judge asked you if you knew people in the court system at all but does anyone – police officers. Has anyone had a bad experience with a police officer? Got pulled over? Only juror number seven out of everybody?
>
> …
>
> POTENTIAL JUROR TWO: I'm sure I have been pulled over and stuff like that before but I don't remember how long ago that was.[31]

Even when the defense attorney was questioning the jurors, prospective juror number two could not remember the question that he asked. For example:

> MR. HALPERN: Are there any of you, taking the judge's question, are there any of you that have any kind of an opinion whatsoever about people having – doing an open carry of a gun; like, boy, I can't stand that, or that's terrible, or that's the People's rights? Some opinion about open carry, okay? Juror number four, and others?
>
> I'll begin because it's the lowest number anyway, number two, and you can tell me as we go. Please, juror number two, tell me what your beliefs and feelings are about that?
>
> POTENTIAL JUROR TWO: Open carry?
>
> MR. HALPERN: Yes.[32]

Therefore, contrary to the Defendant's viewpoint, the prosecutor's version of events and the claim of bad memory of prospective juror number two was not a total fabrication. Rather, it was completely supported by the record and the Defendant's claim of race based exclusion is wholly without merit and was properly rejected by the trial court.[33]

Next, the Defendant claims that there was no race neutral reason articulated for excusing potential juror number three. The assistant prosecutor gave multiple non-race related reasons for peremptorily excusing potential juror number three, including that the juror did not want to be on

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[31] 3/30/2017, 63.
[32] 3/30/207, 85-86.
[33] 3/30/2017, 149.

the jury, that she had arthritis, and that she avoided eye contact with the prosecutor when she spoke to her. The assistant prosecutor gave the following justification for her peremptory challenge:

> MS. POSIGIAN: As it relates to juror number three who I believe was the first juror that I struck, Ms. Whitford. She clearly did not want to be here. She was refusing to make eye contact with myself asking her questions, she was sitting down rolling her eyes, she had her arms crossed a number of points. When the Court asked about real hardships it was my job, it was my kids. The Court asked about medical reasons, oh, I have arthritis. And then also she said she had a torn ligament in her leg and she said it made it difficult for her to sit stand and then she said she had a broken – and then didn't even tell us what the broken part of her body was. And the People would like jurors that – I know everyone doesn't necessarily want to be here, it's not their favorite thing, but people that are going to be attentive jurors. And based on her body language and her lack of interaction with me when I was trying to interact with her as well as the multitude of excuses she gave that is the reason that the People excused her.[34]

Several of these reasons are borne out by the transcript. For example, when asked by the court if anyone had a genuine hardship, prospective juror number three gave the following response: "POTENTIAL JUROR THREE: Yes. Also my job and get my kids to school."[35] When asked about health problems that would make jury service difficult, prospective juror number three gave the following response:

> POTENTIAL JUROR THREE: I have a torn ligament and I have a broken – I have arthritis bad in my knee so I can't sit or stand at periods of time.[36]

Other things pointed out by the prosecutor cannot be contained in the transcript, such as the juror folding her arms and rolling her eyes, but the trial judge confirmed that she did see the prospective juror fold her arms and roll her eyes during voir dire.[37] All of the reasons stated by

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[34] 3/30/2017, 150.
[35] 3/30/2017, 35.
[36] 3/30/2017, 36.
[37] 3/30/2017, 151.

the assistant prosecutor were legitimate non-race related reasons for exercising a peremptory challenge to the juror. The Defendant claims that these were not legitimate reasons but provides no support for this position. *People v Tennille (on remand)*, held that the assistant prosecutor's reference to extreme non-verbal reactions from two jurors was deemed to be a legitimate non-discriminatory reason for excusing two jurors.[38] Therefore, non-verbal cues, such as crossing arms and avoiding eye contact, can be valid reasons for the exercise of a peremptory challenge.[39] The Defendant's position is without merit.

In regards to prospective juror 14, the assistant prosecutor gave the following justification for her exercise of a peremptory challenge to remove the juror:

> MS. POSIGIAN: With regard to juror 14, Ms. Reynolds, it's not on record but Ms. Reynolds was quite clearly pregnant. She indicated that she had gone to the doctor the day before for severe pain. As she's sitting in the jury seat her head was in her hand and she also just appeared to be in extreme pain. It did not appear to the People that she was going to be necessarily inattentive or trying to off the jury but based on her quite extreme pregnancy and the fact that she was having severe pains the day before the People had a concern both with her being able to sit through today as well as possibly losing her over the weekend if she has to keep going back to the doctor. But, again, the head in her hands, her eyes are closing, and she's clearly in distress. The People excused juror number 14.[40]

The court confirmed the observations made by the prosecutor in regards to prospective juror number 14.[41] The court made the following ruling:

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[38] *People v Tennille (after remand)*, unpublished COA opinion no 323059, (December 29, 2016) attached as Appendix A.

[39] "A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's race, facial expression, or manner of answering a question may be important to a lawyer selecting a jury: 'Of all the important communications between human beings, at least 50% is nonverbal.'" *People v Robinson*, 154 Mich App 92, 94–95 (1986), citing *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117, 127 (1966).

[40] 3/30/2017, 152.

[41] 3/30/2017, 155.

> So I'm going to find that there is a race neutral explanation for the peremptory challenge. This lady is pregnant, she did have her head in her hand, she testified to having a doctor's appointment, she was clearly not feeling well. She testified that she has flexible work hours, she has children at home, she is dependent upon her mother for childcare assistance.[42]

Indeed, the record supports both the prosecutor's and the judge's observations as to prospective juror number 14. For example, when asked if she had a genuine hardship in serving on the jury, prospective juror number 14 raised her hand and explained, "Mine is just, basically, my kids missing school because I had to, you know, get here early enough because don't get to school until 8:30."[43] Further, when asked if she could get a good night's sleep on Sunday and pay attention to the trial on Monday, prospective juror number 14 replied as follows: "Mine is direct care. It varies because it goes by my mother's hours because she works two jobs and I take care of my handicap little sister so it's kind [sic] fluctuated between when she works."[44]

> MS. POSIGIAN: But Sunday night, though, you think you can get sleep before you come on in here Monday morning?
>
> POTENTIAL JUROR FOURTEEN: Well, I'm deal with the three kids I got at home and –
>
> MS. POSIGIAN: You never sleep.
>
> POTENTIAL JUROR FOURTEEN: Yeah, I don't. And I definitely don't sleep now.
>
> MS. POSIGIAN: Are there any issues with your pregnancy or anything?
>
> POTENTIAL JUROR FOURTEEN: Well –
>
> MS. POSIGIAN: Medically, that would prevent you or make it difficult for you?

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[42] 3/30/2017, 155.
[43] 3/30/2017, 35.
[44] 3/30/2017, 77.

> POTENTIAL JUROR FOURTEEN: Personally, I don't really want to say that part. But other than that I'll be okay but I do be in pain sometimes. I'm early but still be in pain now. So I just went to the doctor yesterday for being in pain. Other than that I'm okay right now.[45]

The Defendant has not shown how any of the proffered reasons were pretextual. Although the Defendant is correct when he points out that pregnancy is not a disqualifying event for serving on a jury, this does not mean that an assistant prosecutor cannot exercise a peremptory challenge to remove a perspective juror because of potential difficulties related to the pregnancy, contrary to the Defendant's argument. In summary, the prosecution's proffered reasons were not a pretext to disguise intentional discrimination and the Defendant's position is wholly without merit.

B. The trial court's findings in regard to Prospective Juror Five were not Clear Error.

The prosecution objected to the Defendant's exercise of a peremptory challenge to prospective juror number five. The prosecution argued that the Defendant was exercising his challenges to remove white jurors from the panel, specifically potential jurors 11, 14, and 5.[46] The dismissal of a potential juror based solely on his or her race violates the Equal Protection Clause of the Fourteenth Amendment.[47] The Defendant's explanation for the removal of prospective juror number five was as follows:

> MR. HALPERN: Father and brother, I think, were somehow connected with law enforcement. And there were some personal feelings back and forth that I had when I was questioning her that would seem to me to be negative.
>
> THE COURT: Such as what?

[45] 3/30/2017, 78.
[46] 3/30/2017, 173.
[47] *People v Knight*, 473 Mich 324, 335 (2005).

> MR. HALPERN: Just my feelings, my feelings of exchange of words that I felt were unfriendly, somewhat antagonistic I felt. So all of those reasons.[48]

The trial court ruled that the defense's explanation was not sufficient and found that the prosecutor had established purposeful discrimination.[49]

Defense counsel's purported reason for striking the potential juror (his "feelings") had no grounding in fact and simply should not be credited. The ultimate issue in a *Batson* challenge is a pure question of fact – whether a party exercising a peremptory challenge engaged in intentional discrimination on the basis of race. If the party contesting a particular peremptory challenge makes out a prima facie case (that is, points out a pattern of strikes that calls for further inquiry), the party exercising the challenge must provide a legitimate race-neutral reason for the strike.[50] If that is done, the trial judge must then make a finding as to whether the party exercising the peremptory challenge is telling the truth.[51] There is no mechanical formula for the trial judge to use in making that decision, and in some cases the finding may be based on very intangible factors, such as the demeanor of the prospective juror in question and that of the attorney who exercised the strike.[52] For this reason and others, the finding of the trial judge is entitled to a very healthy measure of deference.[53] Determinations as to the demeanor of jurors and the credibility of the proffered reasons for using peremptory challenges lies peculiarly within the trial court's province, and, in the absence of exceptional circumstances, an appellate court

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[48] 3/30/2017, 175.
[49] 3/30/2017, 179.
[50] *Batson v Kentucky, supra*.
[51] *Id.*
[52] *Snyder v Louisiana*, 552 US 472, 477 (2008).
[53] *Id.*, at 479.

will defer to the trial court's determinations.[54] Here, as the trial judge pointed out, the juror had been seated on the panel since the beginning. It should be pointed out that defense counsel only expressed concern about juror number five's police ties after the fact, and allowed juror number four, who had a brother who was a parole officer to remain on the jury.

Moreover, even if defense counsel's peremptory challenge of juror number five should have been granted there is no prejudice to the Defendant since it is apparent that the jury that decided the Defendant's case, including juror number five, was fair and impartial.[55]

[54] *Davis v Ayala*, __ US __, 135 S Ct 2187, 2201 (2015).
[55] *People v Bell*, 473 Mich 275 (2005), holding that the denial of a statutory peremptory challenge is subject to harmless error standard of review.

III. The grant or denial of a mistrial is reviewed for an abuse of discretion and an abuse of discretion will only be found when the denial of the motion denied the defendant a fair trial. The Defendant requested a mistrial because two police officers testified as to their reason for being in the area where the Defendant was arrested. Under the circumstances it was not an abuse of discretion for the court to deny the Defendant's motion for mistrial.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. The proper standard of review for a trial court's decision to grant or deny a mistrial is abuse of discretion.[56] The grant or denial of a mistrial is within the sound discretion of the trial court, and there must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed.[57] The trial court's ruling must be "so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice."[58]

Discussion

The Defendant argues on appeal that the trial court should have granted the Defendant's motion for a mistrial after two police officers testified as to their reason for being in the area where the Defendant was arrested. Prior to trial, the trial court granted the defense's motion in limine that the officers would not mention that they were part of special operations, or that they were investigating narcotics activity. The Defendant claims that the two officers violated this pre-trial ruling, but a review of the record reveals that neither one stated that they were in special operations or that the Defendant was involved in narcotics activity.

Officer Hernandez gave the following testimony:

Q. [by the assistant prosecutor] What is your current assignment?

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[56] *People v Ortiz-Kehoe*, 237 Mich App 508 (1999).
[57] *People v Gonzales*, 193 Mich App 263, 265 (1992).
[58] *People v Holly*, 129 Mich App 405, 415 (1983).

A. [by Officer Hernandez] I'm with the 30-Series at number two, the second precinct.

Q. Second Precinct Detroit Police Department?

A. Correct.

Q. What is 30-Series?

A. We, basically, we go for known offenders. We deal with drugs, guns, anything that comes with violent crimes.[59]

And Officer Collrin gave the following testimony:

Q. [by the assistant prosecutor] Based on your observation you said you let your partner know. Did you do anything else?

A. [by Officer Collrin] No. I just advised – I advised my partner of my observations and then my intention was to the narcotics location that I had a complaint on.[60]

This testimony was non-responsive to the prosecutor's question, but even if the testimony was inadmissible, there was no reversible error in light of the other evidence. The jury was told by both police officers that the Defendant was not involved in any other illegal activity, therefore, there was no chance that the jury would be inclined to believe that the Defendant was involved in narcotic activity.[61]

Also, evidentiary error does not warrant reversal, if when assessed in the light of the other properly admitted evidence, it does not affirmatively appear more probable than not that a different outcome would have resulted without the error.[62] In this case, even in the absence of the police officers' statements regarding their purpose for being in the area, it was not more probable than not that the Defendant would not have been convicted. There was ample evidence

[59] 4/03/2017, 28.
[60] 4/03/2017, 96.
[61] 4/03/2017, 43.
[62] See *People v Duenaz,* 306 Mich App 85, 97 (2014) citing *People v Lukity,* 460 Mich 484 at 495–496 (1999).

from the two police officers that the Defendant was carrying a concealed weapon when he was arrested. Indeed, the Defendant does not dispute that he was carrying a weapon on his hip that day; the only element the Defendant disputes is whether or not he covered the firearm with clothing when he saw the police officers.[63] The jury obviously credited the testimony of the two police officers that testified that they saw the Defendant with his weapon covered by his shirt. The officers would have no discernible reason to fabricate this event, and they even testified that the Defendant was friendly and they felt bad for having to arrest the Defendant.[64] Therefore, reversible error did not occur in this case.

[63] 4/03/2017, 207.
[64] 4/03/2017,58, 106, 107; 208.

IV. A judge's instructions to a jury are reviewed for an abuse of discretion. Here, the trial judge, after consultation with both counsel, in response to a note from the jury requesting to see two police reports, instructed the jury that the police reports were not admitted as evidence in the trial. This response to the jury's question was factually and legally correct, and, therefore, not an abuse of discretion.

Standard of Review

The People dispute the Defendant's statement of the standard of review. The Defendant merely states three distinct standards of review without explanation as to which one applies to the issue.[65] Generally, jury instructions are reviewed under an abuse of discretion standard. [66] An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.[67]

Discussion

The Defendant claims that the trial court erroneously instructed the jury when she told the jury, in response to a note, that the requested police reports were not evidence. The Defendant argues that the court should have advised that the police reports were used for impeachment. But not only is that not required, that would not have been responsive to the juror's note and would have been confusing to the jury. The jury requested a physical copy of both police reports – something that they simply were not entitled to get. The jury did not request to be instructed on how the police reports were used by the Defendant at trial. There was nothing incorrect in the judge's response to the note:

> THE COURT: Ladies and gentlemen, I received a note from you at 10:47 that states can we please see a copy of both police reports. I've had an opportunity

[65] The Defendant's statement of the standard of review includes the clear error, the abuse of discretion, and the *de novo* standards of review. Defendant-Appellant's brief on appeal, p. 31.
[66] *People v Young*, 472 Mich 130, 135 (2005).
[67] *People v Unger*, 278 Mich App 210, 217 (2008).

> to share this note with counsel and I'm going to instruct you that the police reports were not admitted into evidence in this case, all right? Thank you. Please return to your deliberations.[68]

The cases cited by the Defendant are irrelevant to the issue as to whether this was a correct response to the jury's note or not. The Defendant cites to *People v Basinger*, which held that where evidence that is admissible for one purpose but not another, such as where evidence is admitted under MRE 404(b), then the trial court must give a limiting instruction upon request. That holding is simply not applicable to the instant situation where the police reports were never admissible as evidence in the first place so no limiting instruction would have been required.

Similarly inapplicable is *People v Rodriguez*, (also cited by the Defendant) where the jury was not instructed on a major theory of the defendant's defense, that is, that he acquired the vehicles with the intent to make necessary repairs and resell them, he therefore, believed himself to fall with the law that exempts from use tax property that is purchased for resale. The court refused the defendant's request to instruct the jury on the use tax exemption and the jury convicted the defendant. The Michigan Supreme Court held that the failure to instruct on the use tax exemption was reversible error because under the applicable provision the defendant, if the jury believed his version of the facts, would be exempt from the use tax and a trial court must instruct the jury on a theory of the defense that is supported by the evidence.[69] In the instant case, the police reports were not a theory of the defense so any reference to the *Rodriguez* case is misplaced.

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[68] 4/04/2017, 57.

[69] *People v Rodriguez*, 463 Mich 466, 472 (2000).

Also, *People v Moldenhauer* has no applicability to the instant case.[70] In *Moldenhauer* the defendant requested an instruction on mere presence in his manslaughter trial, however, the defendant did not claim mere presence at trial so the trial court did not instruct the jury as to that defense. This was held on appeal to be correct since evidence in the case indicated that the defendant was more than merely just present at the time of the victim's death (the defendant admitted that he drove the perpetrator to the victim's apartment, was in the apartment during the killing, and thereafter drove the perpetrator back to the bar, before driving himself home), and the defendant's actual defenses were intoxication, unwitting accompaniment to the victim's apartment, his purported lack of knowledge until too late, and his own lack of criminal intent.[71] That scenario has no applicability here.

In addition, contrary to the Defendant's assertion, the trial court did not misstate the law as to the use of police statements.[72] Rather, the trial court properly advised the jury that the police reports were not admitted as evidence so the jury could not have physical copies of the reports. The Defendant misstates what happened at trial and cites to no applicable law requiring the trial court to instruct the jury that police reports were used for impeachment purposes. The jury was properly instructed and the Defendant's argument is without merit.

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[70] *People v Moldenhuaer*, 210 Mich App 158 (1995).
[71] *Id.* at 160-161.
[72] Defendant-Appellant's brief on appeal, p. 32.

V. Evidence is sufficient if a rational juror could have found all the essential elements of the crime were proven beyond a reasonable doubt. Here, two police officers testified that they saw the Defendant carrying a gun concealed by his shirt. This evidence coupled with all the other evidence at trial was sufficient to prove that the Defendant carried a concealed weapon.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[73] The reviewing court must make all reasonable inferences and credibility choices which will support the trier of fact's verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[74] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[75]

Discussion

The Defendant claims that there was insufficient evidence to find the Defendant guilty of carrying a concealed weapon.[76] Carrying a concealed weapon requires proof that an accused carried a weapon and that it was concealed on or about his person.[77] In this case, Officer Hernandez testified that on October 15, 2016, at around 4 p.m., he was on duty driving a police

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[73] *People v Nowack*, 462 Mich 392, 399 (2000); *People* v *Petrell*a, 424 Mich 221 (1985).
[74] *United States v Clark*, 741 F2d 1699 (5th Cir, 1984).
[75] *People v Nowack*, 462 Mich at 399 (2000), citing *People v Carines*, 460 Mich 750, 757 (1999).
[76] MCL 750.227.
[77] *People v Shelton*, 93 Mich App 782, 785 (1979).

vehicle in the area of Kendall and Monte Vista in the City of Detroit when his partner, Officer Collrin, drew his attention to the Defendant who was walking toward the street carrying a gun in a pants holster, otherwise known as open carrying.[78] He saw the Defendant continue to walk into the street into a four-door pickup truck that was parked in front of a house. The Defendant opened up the rear passenger door and appeared to be picking up tools.[79] The Defendant then went to the driver's side passenger door and grabbed a blue shirt and put it on so that it covered the weapon.[80] At that point, Officer Hernandez stopped the police car and exited to ask the Defendant if he had a concealed weapons permit.[81] The Defendant told him that his CPL was expired.[82] The Defendant showed him his CPL card.[83] Officer Hernandez verified with his partner that the Defendant's CPL card had an expiration date of 9-12-2015.[84]

Also, Officer Collrin testified on October 15, 2016, he was a passenger in the police vehicle driven by his partner, Officer Hernandez.[85] They were travelling northbound on Monte Vista approaching Kendall when he observed the Defendant walking down the driveway of a house.[86] He observed that the Defendant had a black semiautomatic handgun in a pants holster.[87] The Defendant's shirt changed position so that the gun was concealed.[88] At that point, his partner stopped the scout car and they both exited the vehicle to approach the Defendant.[89] He

[78] 4/03/2017, 34.
[79] 4/03/207, 37.
[80] 4/03/2017, 38.
[81] 4/03/2017, 39.
[82] 4/03/2017, 40.
[83] 4/03/2017, 50.
[84] 4/03/2017, 41; 57.
[85] 4/03/2017, 88-89.
[86] 4/03/2017, 90.
[87] 4/03/2017, 95.
[88] 4/03/2017, 103.
[89] 4/03/2017, 104.

observed a conversation take place between Officer Hernandez and the Defendant.[90] After the Defendant produced a concealed pistol license, the Defendant said that it was "a little expired."[91] Officer Collrin went back to the scout car and ran the license through the LEIN network and discovered that the Defendant's CPL license expired on September 12, 2015.[92] He advised Officer Hernandez of this and the Defendant was disarmed and arrested for carrying a concealed weapon.[93]

The Defendant argues that the testimony of the officers could not be believed because of the evidence he showed on the whiteboard, but as was explained on re-cross examination by both officers, the hypothetical the defense used when referring to the whiteboard was not what actually happened on the day of the crime.[94] The Defendant has not shown that it would have been impossible for the officers to see the Defendant conceal his weapon with a shirt. Therefore, viewing the evidence in the light most favorable to the People, it is evident that the Defendant carried a weapon and concealed it with his shirt. Therefore, there was sufficient evidence to convict the Defendant of carrying a concealed weapon.

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[90] 4/03/2017, 105.
[91] 4/03/2017, 106.
[92] 4/03/2017, 106.
[93] 4/03/2017, 106.
[94] 4/03/2017, 66; 123. Officer Collrin gave the following explanation:

> THE WITNESS: Mr. Kabongo's vehicle is right here. And the defense attorney's claiming we're almost parallel with the bumpers, the front bumpers, and, actually, my vehicle is probably a little further back here. So it's this point of the observations of Mr. Kabongo coming down to the driver side passenger door. And then we pass, park our car right about here, before I make observations of Mr. Kabongo going back up towards the grass right here in front of the house. But the diagram itself was just he had this all the way up here.

4/03/2017, 123.

VI. To merit a new trial based on unobjected to remarks made by the prosecutor, a defendant must show that the remarks were so prejudicial that a cautionary instruction could not have cured the prejudice and that the remarks denied the defendant a fair and impartial trial. Here, the Defendant complains about comments made by the prosecutor in closing argument that were supported by the evidence. The Defendant was not denied a fair and impartial trial by the prosecutor's comments.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. The test for prosecutorial error is whether the defendant was denied a fair and impartial trial.[95] Because of the fact- and context-specific nature of the issue, this Court reviews questions of prosecutorial misconduct case by case and in the context of the particular facts of the case.[96] But when trial counsel fails to object to and request an instruction to cure alleged prosecutorial misconduct, the conviction will not be reversed unless a curative instruction could not have eliminated the prejudice arising from the remarks.[97]

Discussion

Defendant alleges prosecutorial misconduct during the prosecution's closing argument. Prosecutorial misconduct is actually better described as prosecutorial error. As the Michigan Court of Appeals held in *People v Cooper*:[98]

> …it is a misnomer to label claims such as this one as 'prosecutorial misconduct.' This concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4 and *Grievance Administrator* v *Deutch*, 455 Mich 149, 164; 565 NW2d 369 (1997). Although we recognize

[95] *People v Saunders*, 189 Mich App 494, 496 (1991).
[96] Id.
[97] *People v Stout*, 116 Mich App 726, 730 (1982).
[98] *People v Cooper*, 309 Mich App 74, 87-88(2015).

> that the phrase prosecutorial misconduct has become a term of art in criminal appeals we agree that the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.'[99]

Therefore, the People will characterize the Defendant's contention of error as "prosecutorial error" rather than "prosecutorial misconduct."

No Prosecutorial Error in Commenting on Properly Admitted Evidence

The Defendant's claim of prosecutorial error is that the prosecutor, in her closing argument, improperly suggested that Exhibit C was the drawing used to cross-examine Officer Hernandez when in fact Exhibit C was used to cross-examine Officer Collrin.[100] But a reading of the transcript does not reveal that the prosecutor was trying to improperly mislead the jury. The relevant portion of the transcript reads as follows:

> [By Assistant Prosecutor]…And the Court – Well, you heard the testimony and you saw the whiteboard. You saw the whiteboard with Officer Hernandez and with Officer Collrin. And you heard about the placement of the vehicles. And all of the witnesses including the defendant when they're looking at that the whiteboard they all kind told [sic] Mr. Halpern that's not exactly how those cars were and were exaggerated. But if you listen to the testimony and the placement of what they said is the cars the back of the defendant's back bumper was almost at the edge of the driveway of that house. And the back of the police car bumper was just about at the other edge of the driveway at that house. So the placement of the vehicles that's consistent.[101]

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[99] *Id.*
[100] Defendant-Appellant's brief on appeal, p. 40-42.
[101] 4/04/2017, 23-24.

There was nothing misleading about the prosecutor's argument. The prosecutor did not try to imply that Exhibit C was anything other than what it was. In addition, the prosecutor added in her rebuttal closing argument that the jury was going to get a copy of the drawing used when Officer Collrin testified.[102] Also, the jury was instructed at the request of the prosecution, without objection, that the screen shot, Exhibit C, was of the whiteboard after Officer Collrin testified and Officer Hernandez's whiteboard was erased.[103] Therefore, there could not be any possibility that the jury would be confused by the prosecutor's comments in regards to Exhibit C. Therefore, the Defendant's argument is wholly without merit and should be rejected.

[102] 4/04/2017, 35.
[103] 4/04/2017, 41; 51.

RELIEF REQUESTED

THEREFORE, the People request that this Honorable Court affirm the Defendant's conviction and sentence.

Respectfully submitted,

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Dated: February 21, 2018

APPENDIX A

Unpublished Court of Appeals Decision
People v Tennille (after remand), COA No. 323059, decided December 29, 2016.